No. 09-1313

JUL 13 2010

In The

Supreme Court of the United States

HAIDAR MUHSIN SALEH, et al.,

Petitioners,

v.

TITAN CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. The Majority's Decision Creates a Genuine Circuit Split as to Non-State Actors' ATS Liability for the War Crime of Torture..... 1

A. The Court of Appeals' Affirmance of the District Court's Rationale for Dismissal of the Petitioners' ATS Claims Is Binding Precedent, Not Mere Dicta..... 2

B. Petitioners' Appellate Briefs Argued Against Dismissal of Their ATS Claims on the Same Grounds as Their Petition 4

C. The Court of Appeals' Alternate Rationales for Dismissal of the Petitioners' ATS Claims Warrant Summary Reversal..... 9

1. The Court of Appeals Erred in Refusing to Credit the Allegations in the Petitioners' Complaint 9

2. The Court of Appeals Erred in Holding that its Judicially Created "Battle-field Preemption" Defense Bars ATS Claims Arising Under Federal Common Law 11

II. The Majority's "Battle-Field" Preemption Holding Warrants Immediate Review 13

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 10

Baker v. Carr, 369 U.S. 186 (1962) 13, 14

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).....12

Boyle v. United Technologies Corp., 487 U.S. 500 (1988).....15, 20

Carmichael v. Kellogg, Brown & Root Svcs., Inc., 572 F.3d 1271 (11th Cir. 2009).... 13, 14, 16, 17, 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10

Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).....11

Chipanno v. Champion Int'l Corp., 702 F.2d 827 (9th Cir. 1983) 10

Correctional Svcs. Corp. v. Malesko, 534 U.S. 61 (2001).....15

Dolliver v. United States, 379 F.2d 307 (9th Cir. 1967).....11

Estate of Manook v. Resources Triangle Inc., Int'l, 693 F.Supp.2d 4 (D.D.C. 2010).....3

First Chicago Int'l v. United Exch. Co., 836 F.2d 1375 (D.C. Cir. 1988).....10

Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990).....10

TABLE OF AUTHORITIES – Continued

Page

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 10

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 15

Murray v. Schooner Charming Betsy, 2 Cranch 64 (1804) 12

The Nereide, 9 Cranch 388 (1815) 12

The Paquete Habana, 175 U.S. 677 (1900) 12

Richardson v. McKnight, 21 U.S. 399 (1997) 16

Robison v. Canterbury Village, Inc., 48 F.2d 424 (3d Cir. 1988) 10

SEC v. Chenery Corp., 318 U.S. 80 (1943) 10

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 12

United States v. Hill, 131 F.3d 1056 (D.C. Cir. 1997) 10

Wyatt v. Cole, 504 U.S. 158 (1992) 16

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 15

STATUTES

18 U.S.C. §2441(c)(1) 8

28 U.S.C. §1292(b) 5

28 U.S.C. §1350 2

This case warrants review because it creates a circuit split regarding the application of the Alien Tort Statute (ATS) to non-state actors for war crimes. Respondents' attempts to obscure that circuit split by claiming that Petitioners have not previously alleged war crimes are disingenuous. Petitioners are civilian detainees protected by the Geneva Conventions, and have consistently maintained throughout this litigation that they are victims of war crimes, including torture, for which the corporate defendants bear responsibility.

Furthermore, Respondents' submissions that this case challenges Executive "war making" powers or governmental policies regarding the use of contractors is simply inaccurate: this is a case about the commission of war crimes by private actors who violated state, federal and international law. Because of the far-reaching effects of the majority's "battlefield preemption" at a time when contractors outnumber the military participating in overseas operations, this case requires the Supreme Court's immediate attention.

I. THE MAJORITY'S DECISION CREATES A GENUINE CIRCUIT SPLIT AS TO NON-STATE ACTORS' ATS LIABILITY FOR THE WAR CRIME OF TORTURE

Respondents' claim that the majority's ATS holding does not create a genuine circuit split is erroneous,

and rests on an inaccurate characterization of the record below. First, the district court's dismissal of Petitioners' ATS claims rested solely on Respondents' status as non-state actors, and the majority affirmed both the district court's judgment and its rationale. The fact that the majority advanced additional, alternative justifications for its dismissal of the Petitioners' ATS claims does not convert this holding into dicta. Second, Respondents' claim that the Petitioners forfeited their claim that non-state actors are liable for war crimes by failing to preserve it on appeal is flatly inaccurate. Third, the majority's alternative rationales for rejecting Petitioners' ATS claims present no obstacle to review of the first question presented, because they are clearly in error, and warrant summary reversal.

A. The Court of Appeals' Affirmance of the District Court's Rationale for Dismissal of the Petitioners' ATS Claims Is Binding Precedent, Not Mere Dicta

The Court of Appeals held that private actors' torture of civilian prisoners detained in the course of an armed conflict was not actionable under the ATS, 28 U.S.C. §1350, because "[a]lthough torture committed by a state is recognized as a violation of a settled international norm, that cannot be said of private actors." App. 34. Respondents attempt to characterize this holding as dicta. That attempt fails. The majority's ruling that non-state actors are not liable under the ATS for the war crime of torture affirmed both the judgment and rationale of the

district court, and is binding precedent in the D.C. Circuit.

The district court acknowledged that Petitioners had properly alleged torture and war crimes in their complaints. App. 107 (Petitioners "bring allegations of nearly unspeakable acts of torture"); App. 114 ("The complaint asserts Alien Tort Statute claims for . . . war crimes"); App. 119. It nonetheless dismissed their Alien Tort Statute claims because it found that "the question is whether the law of nations applies to *private actors* like the defendants in the present case. . . . in the D.C. Circuit the answer is no." App. 22. The majority affirmed both the district court's judgment and its reasoning, acknowledging that "whether a private actor, as opposed to a state, could be liable under the ATS" is an "issue which divides us from the Second Circuit." App. 31.

The fact that the majority made additional, alternative holdings justifying dismissal of the Petitioners' ATS claims do not convert this affirmance into dicta, as lower courts in the District of Columbia Circuit have already confirmed. In February 2010, a federal district judge dismissed an ATS war crimes claim on the basis of the majority's decision, holding that although "[p]laintiffs have alleged sufficient facts to establish that Defendants have allegedly committed war crimes in violation of the law of nations," their ATS claims were not actionable because the defendant "is not a state actor." *Estate of Manook v. Resources Triangle Inc., Int'l*, 693 F.Supp.2d 4, 19 (D.D.C. 2010).

B. Petitioners' Appellate Briefs Argued Against Dismissal of Their ATS Claims on the Same Grounds as Their Petition

Respondents claim that Petitioners forfeited their argument that private actors' war crimes are actionable under the law of nations, because they did not preserve it in the Court of Appeals. Titan Opp. 9. This is simply false. In their opening brief below, Petitioners listed the following issue presented for review: "Did the District Court err in holding that torture and war crimes by corporate employees are not actionable under the Alien Tort Statute?" Petitioners' Opening Appellate Br., *Saleh v. Titan Corp.*, No. 08-7008. *See also id.* at 19 (citing allegation in government report that a Titan employee had raped a prisoner), *id.* at 39 (stating that Titan was legally required to "discipline and supervise its employees to prevent them from committing war crimes."); *id.* at 63 ("This Court should follow the lead of the Supreme Court, look to the well-developed consensus in both domestic and international law, and hold that Plaintiffs may state ATS claims against [Titan] for war crimes"); Petitioners' Reply Br. 6, n.2, *Saleh v. Titan Corp.*, No. 08-7008 (citing to Titan translator Adel Nakhla's confession to acts that U.S. law defines as war crimes); *id.* at 18 (referring to Plaintiffs' "allegations of torture, war crimes and assault and battery"); *id.* at 24 (arguing that "private actors can be held liable for serious violations of international law, such as the claims for war crimes of the type alleged by Plaintiffs."); *id.* at 24 (noting that "torture *is* a war

crime"); *id.* at 27 (arguing that Titan should be held liable for violation of "*Sosa*-level norms, such as the prohibition against war crimes and torture."); *id.* at 28 ("At this early stage in the litigation, this Court must look to Plaintiffs' Complaint, which pled widespread rape, cruel treatment, forced nudity and murder. The Complaint properly pled war crimes"); Arg. Tr. 30, *Saleh v. Titan Corp.*, No. 08-7008 (D.C. Cir. Feb. 10, 2009) (Petitioners' counsel states that the "ATS claim that has that level of concreteness that *Sosa* requires is the war crimes claim."); Arg. Tr. 29, *Saleh v. CACI Int'l, Inc.*, No. 08-7001 (D.C. Cir. Feb. 10, 2009) (Petitioners' counsel states that "if you look at the conduct that's alleged for each individual [plaintiff], every individual was subjected to a level of physical force that rose to the level of torture.").

Petitioners' counsel did state during oral argument that abuse against prisoners violated the law of nations even if it did not rise to the level of torture, because "the Geneva Convention [states] that you're not to use any physical force" against civilian prisoners. Arg. Tr. 29, *Saleh v. CACI Int'l, Inc.*, No. 08-7001 (D.C. Cir. Feb. 10, 2009). But this statement – which was made during oral arguments in CACI's appeal,[1]

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[1] Petitioners did not file a notice of cross-appeal regarding CACI's ATS liability for war crimes, because there was no order or final judgment of the district court that they had the right to appeal. CACI's appeal was a challenge to the district court's November 6, 2007 interlocutory order (App. 84-106) denying summary judgment to CACI, pursuant to 28 U.S.C. §1292(b). The November 6th order did not discuss the Petitioners' ATS

(Continued on following page)

not the Petitioners' appeal of the district court's ATS holding – was *not* a request for the lower court to recognize a new cause of action for assault and battery under the ATS. Rather, it was an argument that that there was no conflict between the Respondents' state and federal legal duties. In response to the Court's inquiry whether "assault and battery would be covered by the law of nations," counsel confirmed that "[i]n this context it would be," *id.* at

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claims, which the district court had dismissed in two previous interlocutory orders. App. 107-138. Because of this, CACI moved to intervene in the Petitioners' appeal of the district court's judgment regarding Titan, on grounds that "CACI remains a defendant in the *Ibrahim* and *Saleh* lawsuits, and CACI will be bound by this Court's resolution of these appeals to the extent this Court's ruling addresses the legal sufficiency of Plaintiffs' Alien Tort Statute claims." CACI Mot. to Intervene, *Saleh v. Titan Corp.*, No. 08-7008 (Mar. 28, 2008). The Court of Appeals granted CACI's motion on June 13, 2008. Because of this, Petitioners briefed the issue of corporate liability for war crimes solely in the Titan appeal, but made clear during briefing and oral argument that CACI had also committed the war crime of torture. *See* Petitioners' Appellate Br. 17, 39-40, *Saleh v. CACI Int'l, Inc.*, No. 08-7001; Petitioners' Opening Appellate Br. 17, n.5, *Saleh v. Titan Corp.*, No. 08-7008 (citing evidence that "CACI interrogators Steven Stefanowicz and Daniel Johnson were two of the ringleaders of prisoner torture at Abu Ghraib"). Given the majority's acknowledgement that Petitioners' allegation "that one of *CACI*'s employees observed and encouraged beating of a detainee's soles with a rubber hose, which could well constitute torture or a war crime," App. 5, n.1 (emphasis in original), its failure to remand to the district court on the issue of CACI's liability for war crimes underscores its adoption of the district court's conclusion regarding non-state actors' ATS liability.

30, because it violated the duty imposed by federal common law and the Geneva Conventions

> not to inflict physical harm on the detainees. And this really goes to the point of the duty of care and why the argument made by CACI that the combatant activities exception eliminates any duty of care is not accurate because when we're looking under federal common law . . . the federal common law incorporating the law of war, the law of war does not eliminate a duty of care. The law of war does the opposite, it makes specific when there are duties of care. And one of the places in which there is a duty of care is when people are detained, they're no longer out in the battlefield.

Id. at 31.

This statement, far from being "absurd" or "untenable," App. 33, is plainly accurate. The Army has acknowledged that prisoners at Abu Ghraib were protected persons under the Fourth Geneva Convention. *Titan* J.A. 529-530. Article 27 of that treaty requires that protected persons "be humanely treated, and . . . protected especially against all acts of violence or threats thereof." App. 156. Article 32 forbids signatories from "taking any measure . . . to cause the physical suffering" of protected persons in captivity, including "corporal punishments" and "any other measures of brutality whether applied by civilian or military agents." App. 157. Article 37 states that protected persons who are detained must

"during their confinement be humanely treated." App. 157. Article 147 defines "grave breaches" of the Convention to include not only torture and murder, but also "inhuman treatment," and "willfully causing great suffering or serious injury to body or to health." App. 159. *See also* U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5(a)(4) (Oct. 1, 1997) (App. 160-161) (military regulations implementing the Geneva Conventions state that inhumane treatment of detainees "is a serious and punishable violation under international law . . . "); *id.* at §1-5(b) (prohibiting "corporal punishment" and "all cruel and degrading treatment" of prisoners); *id.* at §1-5(c) (prisoners "will be protected against *all acts of violence* to include rape, forced prostitution, *assault* and theft, insults, public curiosity, *bodily injury*, and reprisals of any kind") (emphasis added).

Grave breaches of the Geneva Conventions are war crimes under United States and international law. *See* 18 U.S.C. §2441(c)(1). The Petitioners' complaints alleged such grave breaches. Petitioners asked the Court of Appeals to reverse the district court's dismissal of their ATS claims for the war crime of torture, which violates a specific, universal, and obligatory international law norm. As Petitioners argued below, private parties' liability for war crimes, including torture, has been recognized by the Second and Eleventh Circuits, by numerous international law sources starting with the Nuremberg tribunals, and recently confirmed by the United States' Congress and Executive Branch. The Court of Appeals' contrary holding warrants a grant of *certiorari*.

C. The Court of Appeals' Alternate Rationales for Dismissal of the Petitioners' ATS Claims Warrant Summary Reversal.

The majority's alternative grounds for dismissing Petitioners' ATS claims are so clearly in error as to warrant summary reversal, and thus present no obstacle to reaching Petitioners' first question presented.

1. The Court of Appeals Erred in Refusing to Credit the Allegations in the Petitioners' Complaint.

The Third Amended Complaint in and the Second Amended Complaint in *Ibrahim* allege specific acts of brutality that rise to the level of torture, and properly state causes of action for torture and war crimes. Pet. 6-7. The majority, however, held that it was not required to credit these allegations, because,

> after discovery and the summary judgment proceeding, for whatever reason, plaintiffs did not refer to those allegations in their briefs on appeal. Indeed, no accusation of "torture" or specific "war crimes" is made against Titan interpreters in the briefs before us. We are entitled, therefore to take the plaintiffs' cases as they present them to us.

App. 4. As noted above in Section I(B), this is not an accurate characterization of the Petitioners' briefs.

Moreover, the majority disregarded the fact that the district court limited both discovery and summary

judgment briefing to the issue of preemption. There has been no discovery on the merits of Petitioners' allegations. App. 38, 44, 115-16, 133-35. This Court has held that summary judgment is not appropriate unless the plaintiff has "a full opportunity to conduct discovery" on the issues in question. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment appropriate only "after adequate time for discovery"). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990) (before plaintiffs were permitted to take discovery on an issue, court was required to "accept as true all the plaintiff's well-pleaded factual allegations and the inferences reasonably drawn from them."); *First Chicago Int'l v. United Exch. Co.*, 836 F.2d 1375, 1376 (D.C. Cir. 1988); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 426, 429 (3d Cir. 1988); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 n.2 (9th Cir. 1983).

In line with these precedents, and the limitations it placed on discovery, the district court has not made any factual findings regarding the merits of plaintiffs' allegations of torture and war crimes. An appellate court has no authority to act as an initial fact finder. *See, e.g., United States v. Hill*, 131 F.3d 1056, 1061 (D.C. Cir. 1997) (noting that "where the correctness of the lower court's decision depends upon a determination of fact which only a [fact-finder] could make but which has not been made, the appellate court cannot take the place of the [fact-finder]") (internal quotations and citations deleted). *See also SEC v. Chenery Corp.*,

318 U.S. 80, 88 (1943) (same). This Court should summarily reverse the majority's attempt to "usurp the function of the duly constituted fact finder," *Dolliver v. United States*, 379 F.2d 307, 308 n.1 (9th Cir. 1967).

2. The Court of Appeals Erred in Holding that its Judicially Created "Battle-field Preemption" Defense Bars ATS Claims Arising Under Federal Common Law

The lower court's holding that if "state tort law is preempted on the battlefield because it runs counter to federal interests, the application of international law to support a tort action on the battlefield must be equally barred," App. 37, conflicts with this Court's decisions, and has no basis in precedent or statute. In support of its argument, the majority cited only one inapposite case, *Chamber of Commerce of U.S. v. Reich,* 74 F.3d 1322 (D.C. Cir. 1996), in which the D.C. Circuit held that a federal statute (the National Labor Relations Act) preempted an Executive Order on federal procurement policy. App. 37. A precedent holding that a federal statute is *lex superior* to an executive order does not support the Court of Appeals' holding that its newly-created common law defense of "battle-field" preemption is *lex superior* to the long line of precedents affirming that federal common law incorporates the law of nations. *See* Brief of *Amici Curiae* Professors of Federal Courts, International Law, and U.S. Foreign Relations Law at 10-15. *See*

also Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"). *See also Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) ("'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.").[2]

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[2] CACI's claim that "the Constitution itself, by assigning war powers exclusively to the political branches, occupies the field and precludes judicial review," of U.S. contractors' wartime conduct is an argument for a finding of nonjusticiability under the political question doctrine, not a preemption defense. CACI Opp. 9, n.5. CACI argued before the both the district court and the Court of Appeals that this case presents a political question, but the district court rejected that claim (App. 109, 124-128) and the Court of Appeals did not reach it.

II. THE MAJORITY'S "BATTLE-FIELD" PREEMPTION HOLDING WARRANTS IMMEDIATE REVIEW

Respondents cite the United States' *amicus* brief opposing *certiorari* in *Carmichael v. Kellogg, Brown & Root Svcs., Inc.*, No. 09-683 (May 28, 2010) to argue that the Court should allow the majority's preemption holding to stand while the issue of military service contractors' tort liability "percolates" in the lower courts. But the Court of Appeals' holding in this case sweeps far broader than the Eleventh Circuit's holding in *Carmichael*, 572 F.3d 1271 (11th Cir. 2009), and warrants immediate review under the standards set forth in Supreme Court Rule 10. The majority held that the Federal Tort Claims Act's combatant activities exception, and the federal government's power over foreign affairs, preempted the *entire body of tort law* from applying to private, for-profit military contractors in Iraq and Afghanistan. Given the conflict between the majority's decision and this courts' preemption jurisprudence, and the harmful policy implications of allowing contractors to violate the laws of war with impunity, further percolation is both unnecessary and inappropriate.

In *Carmichael*, the Eleventh Circuit applied the well established *Baker v. Carr*, 369 U.S. 186 (1962), analysis to determine whether a plaintiff's claims presented a nonjusticiable political question to the facts concerning a military fuel supply convoy accident in Iraq. *See* U.S. Br. at 16, *Carmichael*, *supra*. Based on the district court's factual findings that the convoy

was led by a military officer, and the military had determined the convoy's exact route, departure time, the amount of supplies to be transported, the speed at which vehicles would travel, the security measures taken, and the space maintained between vehicles, the Court of Appeals found that it could not evaluate the Plaintiff's negligence claims without examining sensitive military judgments, which the Constitution had textually committed to the Executive Branch. *Id.* at 2-7. The *Carmichael* court further found that there were no judicially manageable standards to resolve the plaintiff's negligence claim, because a trial court would be forced to ask "what a reasonable driver subject to military control over his exact speed and path would have done," and would have to take into account the fact that "any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack." *Id.* at 7. The Solicitor General stated that the Court of Appeals "may have ultimately erred" in applying the *Baker v. Carr* factors "to the particular facts of this case," *id.* at 16, but nonetheless opposed *certiorari*.

In this case, the Court of Appeals did not merely misapply a properly stated rule of law, or make erroneous factual findings. Instead, the majority created an entirely new doctrine of government contractor preemption, "to coin a term, 'battle-field preemption,'" App. 16, based on the combatant activities exception to the Federal Tort Claims Act. The majority held that FTCA preempted all tort suits

against service contractors "integrated and performing a common mission with the military," App. 13, in combat zones, because

> the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield. . . . And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor.

App. 115.

As Judge Garland explained in his well-reasoned dissent (App. 38-83), this doctrine is not merely "novel"; it also conflicts with binding Supreme Court precedents on the scope of government contractor preemption, and on the proper analysis of whether a federal statute preempts generally applicable state tort law. In holding that the combatant activities exception preempted "the imposition per se" of tort liability, the majority abandoned the requirement of *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-509 (1992) and *Correctional Svcs. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), of a direct conflict between a contractor's federal and tort law duties. The assertion that "the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor" disregards the text of the FTCA, and *Wyeth v. Levine's* holding that state law is not to be superseded "unless that was the clear and manifest purpose of Congress." 129 S. Ct. 1187, 1194-1195 (2009) (quoting *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 485 (1996)). *See also* Pet. 26-32; *Richardson v. McKnight*, 521 U.S. 399, 403-404 (1997) (private actors do not automatically receive governmental immunity, and "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit" for violating prisoners' civil rights); *Wyatt v. Cole*, 504 U.S. 158 (1992) (conspiracy with government officials does not confer government immunities). The majority's alternative holding, that Petitioners' claims are preempted by the federal government's foreign affairs power, is equally unsupported by precedent. Pet. 33-37.

Further percolation in the Courts of Appeals will not resolve this conflict, and the grave and harmful policy implications of the majority's decision counsel against letting it stand. As the United States stated in its amicus brief in *Carmichael*, the U.S. government

> has significant interests in ensuring that its contractors exercise proper care in minimizing risks to service members and civilians and do not avoid appropriate sanctions for misconduct. Contractor misconduct resulting in harm to local nationals abroad also in some circumstances can have significant negative foreign policy implications for the United States.

U.S. Br. at 9, *Carmichael*, *supra*. *See also* Brief of *Amici Curiae* Human Rights First et al. at 21, quoting U.S. DEP'T OF THE ARMY, UNITED STATES ARMY COUNTERINSURGENCY HANDBOOK 1-24,

¶ 1-132 (2006) (Participants in counterinsurgency operations "must follow United States law, including domestic laws, treaties to which the United States is a party, and certain [host nation] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term [counterinsurgency] efforts"); App. 173 (Department of Defense affirms "the current rule of law . . . holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors," and declines to "invite courts to shift the risk of loss to innocent third parties" through "defenses based on the sovereignty of the United States" for the contractor's "own actions.").[3]

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[3] Respondents' claim that the Solicitor General's brief in *Carmichael* disavowed DoD's regulatory comments is incorrect. The Solicitor General's brief noted that the DoD comments supported "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors," and suggested that courts should not permit contractors to invoke the United States' sovereignty to avoid liability for their "own actions." U.S. Br. at 12, n.4, *Carmichael*, *supra*. It also noted DoD's statement that "[c]ontractors will still be able to defend themselves when injuries *to* third parties are caused by the actions or decisions of the Government," and stated that the regulatory comments took no position as to liability in cases like *Carmichael*, where there is genuine ambiguity as to whether the military's or contractor's conduct caused the plaintiffs' injuries. *Id.* In this case, however, there is no such ambiguity. Petitioners allege conduct that violates federal law, the laws of war, and U.S. policy, and Respondents have never produced evidence that

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To be sure, this interest must be balanced against competing governmental interests. *See* U.S. Br. at 9, *Carmichael*, *supra*. But there is no justification for disregarding it entirely. This is particularly true in a case that arises out of the torture of prisoners at Abu Ghraib, which *amici* Retired Military Officers describe as "one of the most shameful episodes in our Nation's otherwise honorable military history – an episode that damaged our country's hard-earned reputation for lawful and humane treatment of wartime detainees." Brief of *Amici Curiae* Retired Military Officers at 4.

As the officers state, "[a]bsent traditional tort liability, there is not a meaningful mechanism to hold accountable those who engage in patently unlawful conduct or to deter private military contractors from abusing prisoners in the future." *Id.* at 21. Although criminal prosecution and contractual remedies for contractor misconduct are theoretically available, U.S. Br. at 14, n.7, *Carmichael*, *supra*, there are substantial legal and practical obstacles to federal prosecution of contractors who commit felonies. *Id.* at 22-23. Moreover, "absent the coercive effect of tort liability, private military contractors have little incentive to prevent future abuses by their employees," because "[c]orporations may shift responsibility to individual employees and claim that they have fulfilled their legal obligations by firing them." *Id.* at 23.

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the military ordered or authorized its employees' torture of prisoners.

Corporate actors do have contractual duties to the government, but they are "primarily accountable to private shareholders," *id.* at 15, and the federal government has had difficulty enforcing contractual remedies even against corporations that serially violate United States criminal law. *See, e.g., Blackwater Deal in Afghanistan Questioned by Congress*, The Guardian, Jun. 28, 2010; *Blackwater Likely to Face No Sanctions*, McClatchy Newspapers, June 28, 2010 (recent news articles describe recent award of new security contracts worth $220 million to Xe Services, Inc., despite its employees' multiple massacres of unarmed civilians and the recent indictment of its former President and four other high ranking executives on weapons smuggling charges).

There are 217,832 contractor personnel providing services to the United States in Iraq and Afghanistan, answering not to the military chain of command but to for-profit corporations who receive a total of over $5 billion annually for their services. Pet. at 20-21. The majority's holding has "eviscerated" one of the most effective means of deterring them from violating the law, Brief of *Amici Curiae* Retired Military Officers at 25, and is contrary to Supreme Court precedent, the text of the relevant statute, and the stated policy interests of the Executive branch. The liability of military service contractors for common law torts and for war crimes is clearly an issue of national importance. Further percolation in the lower courts may be helpful in cases that turn on a factual dispute as to whether the military or a

contractor caused a plaintiff's injury, or how to precisely apply the *Boyle* preemption test, the political doctrine, and other relevant defenses to the facts of cases arising in combat zones. But the majority's opinion presents the threshold question of whether military contractors providing services in war zones can *ever* be held civilly liable for their tortious conduct, or if all such suits are preempted because the combatant activities exception to FTCA's waiver of sovereign immunity demonstrates that "the very purposes of tort law are in conflict with the pursuit of warfare." App. 16. The answer to that question will have serious implications not only for the torture victims in this case, but for U.S. foreign policy, and for thousands of U.S. soldiers and innocent civilians who have been or may be gravely injured by military contractors' misconduct. Because of the breadth of the majority's holding, this case is an unusually strong vehicle for resolving that question, and warrants immediate review by this Court.

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